

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KENNETH FLEMING, JOHN DOE, R.K., and  
T.D.,

Plaintiffs,

v.

THE CORPORATION OF THE PRESIDENT  
OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, a Utah corporation  
sole, a/d/a "MORMON CHURCH"; LDS  
SOCIAL SERVICES a/d/a LDS FAMILY  
SERVICES, a Utah corporation,

Defendants.

NO. 04-2338 RSM

**DEFENDANT'S REPLY BRIEF IN  
SUPPORT OF MOTIONS IN LIMINE**

**I. ARGUMENT**

**A. This Court Should Exclude All Evidence Regarding Loholt After January 1973.**

**1. Plaintiff's Testimony Cannot be Read as Plaintiff Now Proposes.**

COP's opening motion argued that evidence regarding Loholt after January 1973 should be excluded because (1) Plaintiff testified that he was abused by Loholt while Loholt was living in the Allenbach residence; and (2) Loholt moved out of the residence in January 1973. Plaintiff now argues, however, that he never testified that the abuse occurred when Loholt was "residing" in the apartment. This argument is strained, at best, and is inconsistent with a fair reading of

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1 Plaintiff's testimony. Plaintiff testified, "All the abuse occurred in his apartment." Kelly Dep. at  
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3 19:4-15. Even more specifically, Plaintiff testified:  
4

5 Q. And according to the incidents that you relate that followed after  
6 that, you apparently continued to go back to the apartment where  
7 Mr. Loholt was living, though; is that correct?  
8

9 A. That's correct.  
10

11 Kelly Dep. at 26:4-11 (emphasis added). *See also, Id.* at 26:18-20; 75:11-17.  
12

13 Moreover, Plaintiff's mother testified that Mr. Loholt was living at the Allenbach  
14 residence when the abuse occurred. Dorothy Kelly Dep. at 33-34.  
15

16 Q. Now, let me ask you this: Do you know at this time when this  
17 incident occurred, were you aware as to whether or not Jack Loholt  
18 was living in the Allenbach house?  
19

20 A. Yes. He lived in the mother-in-law apartment.  
21

22 Dorothy Kelly Dep. at 34:16-19. Since Mr. Loholt's abuse of Plaintiff occurred over a period of  
23 months, not years, the abuse could not have occurred in 1973-74. R.K. Dep. at 19:24; 23:11.  
24

25  
26  
27 **2. Loholt's Testimony Regarding His Abuse of R.A. Does Not Support**  
28 **Plaintiff's Argument.**  
29

30 Plaintiff argues that because Mr. Loholt abused Plaintiff and R.A. at the same time, and  
31 Mr. Loholt abused R.A. after receiving counseling at LDS Social Services, some of Mr. Loholt's  
32 abuse of Plaintiff must have occurred after Loholt went to LDSSS. However, that conclusion  
33 would follow from the premises only if Mr. Loholt's first instance of abuse of R.A. followed Mr.  
34 Loholt's counseling at LDSSS. But, this is not true—R.A. was one of his *first* victims. Loholt  
35 Dep. at 96:1-6. Thus, Mr. Loholt abused R.A. before and after counseling at LDSSS. The fact  
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1 that Plaintiff and R.A. were abused during the same period of time is thus meaningless, and does  
 2  
 3 not suggest Plaintiff's abuse followed Mr. Loholt's treatment at LDSSS.<sup>1</sup>  
 4

5 **3. COP's Motion to Exclude Reference to LDS Social Services Should Be**  
 6 **Granted.**  
 7

8 Plaintiff's argument for allowing the introduction of evidence regarding LDS Social  
 9  
 10 Services is based on a selective and misleading portion of Loholt's testimony. Loholt plainly  
 11  
 12 states, in three separate places, that he cannot remember when he was counseled by LDS Social  
 13  
 14 Services. Loholt Dep. at 138:12; 146:15; 146:24-25. Hence, Mr. Loholt's testimony does not  
 15  
 16 make it more probable than not that LDSSS counseled Loholt prior to his abuse of Plaintiff.  
 17

18 **B. Plaintiff Does Not Rebut COP's Argument that the Term Allenbach "Compound"**  
 19 **Should be Excluded Under FRE 403.**  
 20

21 Plaintiff claims that calling the Allenbach property a compound "does not unfairly  
 22  
 23 prejudice COP despite whatever negative modern-day connotations" are associated with the  
 24  
 25 word. However, it is exactly these "negative modern-day connotations" that are the basis of the  
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 27 motion. Plaintiff does not dispute that the term compound is loaded, or that it is commonly used  
 28  
 29 in the media to describe the base of operations of violent, fringe groups in society. COP's FRE  
 30  
 31 403 motion should thus be granted.  
 32

33 As to Plaintiff's claim that the Allenbach property actually was a "compound," none of  
 34  
 35 the evidence cited by Plaintiff addresses the condition of the Allenbach property at the time Mr.  
 36  
 37 Loholt abused Plaintiff. The only one who did that was Mr. Loholt, and he testified that there  
 38  
 39 were no other buildings besides the main home on the property at that time. Loholt Dep. at  
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42  
 43 <sup>1</sup> Plaintiff also states that Loholt abused Plaintiff and R.A. simultaneously. Second Rosenberger Declaration, Ex. 1  
 44 at 6:5-15. Given that R.A. was one of Loholt's first victims, there is no basis for concluding such abuse followed  
 45 Loholt's treatment at LDSSS.

86:15-87:3, Loholt Dep. at 90:18-91:4. Subsequent alterations to the property after Plaintiff was abused by Loholt are irrelevant.

**C. The Court Should Grant COP's Motions Regarding Church Doctrine.**

COP filed three separate motions on the subject of church doctrine. Plaintiff's response does not correspond to the motions numbered 10 through 12 in COP's opening brief. The discussion below follows COP's original motions.

**10. COP's Motion to Exclude References to or Interpretation of Church Doctrine Should be Granted.**

Plaintiff appears not to take issue with the overwhelming majority of this motion. Plaintiff addresses only item G on page 14 of COP's motion, which seeks to exclude the Church's General Handbook of Instructions.

The Handbook is, indeed, an official church publication, but Plaintiff apparently seeks to put to use the Handbook for impermissible purposes.<sup>2</sup> Plaintiff argues that the Handbook, and other documents, are admissible "as bearing upon the issues of special relationship, foreseeability, . . . and the reasonableness of Defendant's conduct." Plaintiff's Opp. at 8. It is impermissible to utilize church doctrine and organization to establish secular duties or to prove breach of such duties (i.e., negligence) because such uses would foster excessive entanglement with religion. *See, e.g., Schmidt v. Bishop*, 779 F. Supp. 329, 328 (S.D.N.Y. 1991). At minimum, the motion should be granted as to all evidence other than the Handbook that Plaintiff seeks to introduce to contradict the Church's interpretation of its own doctrine, including the meaning of the title "high priest."

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<sup>2</sup> COP cannot cite the specific Handbook provisions in question because, despite requests from COP counsel, Plaintiff had not produced his proposed exhibits.

1           **11. The Court Should Exclude the Encyclopedia of Mormonism.**

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3           The Encyclopedia of Mormonism is hearsay because it is not an official publication of  
4  
5 the Church, and the preface so indicates: “[the authors’] statements and opinions remain their  
6  
7 own. The Encyclopedia of Mormonism . . . and the contents do not necessarily represent the  
8  
9 official position of The Church of Jesus Christ of Latter-Day Saints.” Dkt. #171, Ex. 2.

10  
11           Moreover, Plaintiff fails to rebut COP’s argument that such a document cannot be used to  
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13 contradict the official position of the church. Bishop Borland will testify at trial regarding  
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15 matters such as the organization of the church, the duties of the Bishop and the meaning of the  
16  
17 phrase “high priest.” The church’s view on such subjects, as offered by Bishop Borland, cannot  
18  
19 be contradicted by extrinsic evidence as that would force the jury to decide between Bishop  
20  
21 Borland or the Encyclopedia regarding matters of Church policy and doctrine.

22  
23           **12. Motion to Exclude Mrs. Kelly’s Testimony.**

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25           Plaintiff presents no opposition to this motion. It should be granted.

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27           **D. The Motion to Exclude Prior Deposition Testimony Should be Granted.**

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29           COP moved to exclude the deposition testimony of Harold Brown and Dwayne Liddell  
30  
31 from the 1998 case of *Scott v. COP*, which was litigated in Oregon. That motion should be  
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33 granted because Plaintiff concedes he will not offer such testimony. Plaintiff, however,  
34  
35 identifies a new deponent from the *Scott* case, Dr. Lloyd Hale, whose testimony he seeks to  
36  
37 offer. This testimony should be excluded. Plaintiff’s new disclosure is untimely and Plaintiff  
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39 does not meet his burden of showing “substantial similarity” between this case and *Scott*.

40  
41           Plaintiff did not disclose his intent to use Dr. Hale’s testimony until Plaintiff filed his  
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43 opposition to the motion in limine. Plaintiff’s Pretrial Statement was served upon defense  
44  
45 counsel on August 21 and, even at that late date, Dr. Hale was not identified as a witness.

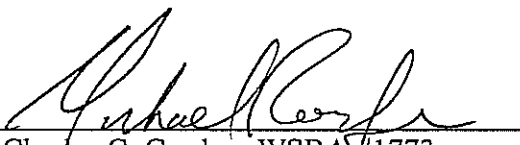
1 Rosenberg Decl. Exhibit 2. Pursuant to CR 16 (h), Plaintiff was required to list all witnesses  
 2 and exhibits. CR 16(n)(1) provides that "the provisions of this rule will be strictly enforced.  
 3  
 4 Sanctions and penalties for failure to comply are set forth in GR 3 . . ." GR 3(a), in turn,  
 5  
 6 provides that the Court may exclude testimony not disclosed pursuant to the rule.  
 7  
 8

9 Moreover, Plaintiff still has not shown "substantial similarity" of issues. The testimony  
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 11 cited by Plaintiff provides the witness with a hypothetical, but does not include the critical fact  
 12  
 13 that gave rise to the clergy-penitent motion in this case: whether the member in this case  
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 15 (Richard Pettit) was seeking spiritual counsel. More generally, Plaintiff fails to present any  
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 17 evidence that the specific issues in the *Scott* case were similar. Plaintiff has the burden of proof  
 18  
 19 on this issue, and has failed to meet it. *Hub v. Sun Valley*, 682 F.2d 776, 778 (9<sup>th</sup> Cir. 1982)  
 20  
 21 ("Hub failed to show that the deposition relates to issues common to both lawsuits.").

22  
 23 Finally, Dr. Hale's testimony relates solely to the question of whether the communication  
 24  
 25 from Richard Pettit to Bishop Borland was privileged. This Court has now resolved that issue,  
 26  
 27 and Dr. Hale's testimony is irrelevant.  
 28

29 DATED this 15<sup>th</sup> day of September, 2006.  
 30  
 31

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33  
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